APPEAL NO. 93360

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on April 2, 1993, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) reached maximum medical improvement (MMI) on December 2, 1992, with a five percent whole body impairment rating. Claimant appeals urging that the great weight of the medical evidence showed that he had not reach MMI by December 2, 1992, and that the hearing officer erred in finding that the designated doctor's certification of an impairment rating was not overcome by the great weight of contrary evidence. Claimant also takes issue with the hearing officer's gratuitous finding concerning the claimant's employer. The claimant has produced a return receipt showing that a copy of the request for review was received by the respondent (carrier) on May 10, 1993, and because the response to the request for review shows a date of June 18, 1993, the response is determined to be untimely and cannot be considered. Service on the opposing party begins the date for determining whether a response is filed within the required 15 day period. *See* Texas Workers' Compensation Commission Appeal No. 93353, decided June 21, 1993.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, the decision is affirmed.

The claimant having sustained a compensable injury to his back on (date of injury), when a pipe fell on him, was not in dispute. He saw a number of doctors over the ensuing two years and multiple diagnostic tests were performed on him including x-ray, myelogram, CT scan, MRI and EMG. His course of treatment has run the gambit from one of his earlier doctors returning him to work to a later one indicating the possibility for surgery. The claimant testified that he has remained in considerable pain and has not been able to return to work. Medical reports and opinions in evidence from his treating doctor, (Dr. D) indicate a diagnosis of "posterior bulge L5-S1 with degenerative disc disease." Dr. D does not feel the claimant has reached MMI (although he indicated in a "9/8/92" report that "his situation really isn't going to change") and stated in a deposition that if he were to give an impairment rating it would be in the 10-15% range. It appears from the record that during the course of his treatment, the claimant has followed a conservative regimen including therapy and work hardening programs. Records from Dr. D indicate that the claimant felt a "pop" in his back on an occasion or two during mid-1992 and that it caused him pain. The consensus of the medical opinions seems to be that surgery is not indicated. The claimant was seen by several other doctors on referral and on the request of the carrier, including a (Dr. C) with whom the claimant started treating sometime in March 1992. This apparently resulted from an agreement reached at a benefit review conference (BRC) in January 1992. Dr. C rendered a Report of Medical Evaluation (TWCC-69) and certified that MMI was reached on "12/2/92" and assessed a zero percent impairment rating. Dr. C also performed a myelogram which was followed by a CT scan on "11-3-92" and the report indicated that the myelogram was "normal" with the impression stated as:

There is a small midline bulging disc at the L5-S1 level, seen only on the CT scan. This does not encroach upon neural elements. The examination is otherwise normal.

The claimant testified that the commission designated doctor who he saw on November 24, 1992, only gave him a very cursory examination and that his report should not be given any weight. The claimant acknowledged, and the report indicates, that the designated doctor had the claimant's medical records and test results at the time of the examination. The designated doctor's report indicates that claimant has "undergone extensive evaluation by multiple physicians," that the claimant has undergone therapy including lumbar epidural injections, that the physical exam shows the claimant walking with an exaggerated limp, that reflexes and neurosensory are intact and that his flexation is 40 degrees limited by pain. The designated doctor certified that the claimant reached MMI on "11-24-92" with a five percent whole body impairment rating.

The claimant complains that the hearing officer entered a finding of fact that he was employed by the employer, a matter not in dispute or in issue. While it is true that the finding of fact concerning the claimant's employer was not in issue although it was repeatedly mentioned in the evidence, we can find no indication of harm or prejudice to the claimant from this "gratuitous" finding. Indeed, there is no requested relief sought and no assertion of any harm or prejudice. No "corrective" action is indicated or warranted.

Concerning the matter of MMI and impairment rating, it is clear that there is some conflict in the evidence. However, it is also equally clear to us that there is no sound basis for us to declare, in opposition to the finding of the hearing officer, that the great weight of other medical evidence is contrary to the certification of the designated doctor. In the area of fact finding, the 1989 Act clearly provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). In fulfilling this responsibility, the hearing officer, as the finder of fact, resolves conflicts and inconsistencies in the testimony and evidence. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Texas Workers' Compensation Commission Appeal No. 92234, decided August 11, 1992. Only were we to find, which we do not, that the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we have a sound basis to disturb the decision. In re King's Estate, 244 S.W.2d 660 (Tex 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

Some confusion was obviously interjected into this case from the inartful and potentially misleading statement of agreement at the BRC. The language misconstrued and misused words having very specific meaning under the 1989 Act. The agreement is

set out verbatim:

Parties agree that (claimant) will now be treated by (Dr. C) and he will determine maximum medical recovery/improvement and disability.

The hearing officer concluded from this language that the most that could be said was that the parties did agree to an MMI date as determined by Dr. C. We cannot fault her determination, under the circumstances, and note that it was favorable to the claimant as opposed to the designated doctor's certification of MMI on November 24, 1992. We also note that it was an alternate position urged by the carrier at the contested case hearing. In our opinion, stating that Dr. C will be treating the claimant does not make him a designated doctor. And furthermore, we note from the record that Dr. D apparently continued to be the claimant's treating doctor and that claimant was not stating a change of treating doctors. The proviso that Dr. C would determine "maximum medical recovery/improvement" is sufficient to establish an agreement of the parties to this issue but only this issue. The use of the words "and disability," is, by no stretch of the imagination, sufficient to encompass an agreement on an assessment of whole body impairment. Therefore, although MMI and impairment rating are usually accomplished in tandem and are sometimes "inextricably" tied together, it is possible for the parties to agree to an issue of MMI alone. Article 8308-1.03(3). *See* Texas Workers' Compensation Commission Appeal No. 93124. decided April 1, 1993; Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993.

The evidence being sufficient to support the decision of the hearing officer, it is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge